COVID-19 Japan Update

CITY-YUWA PARTNERS

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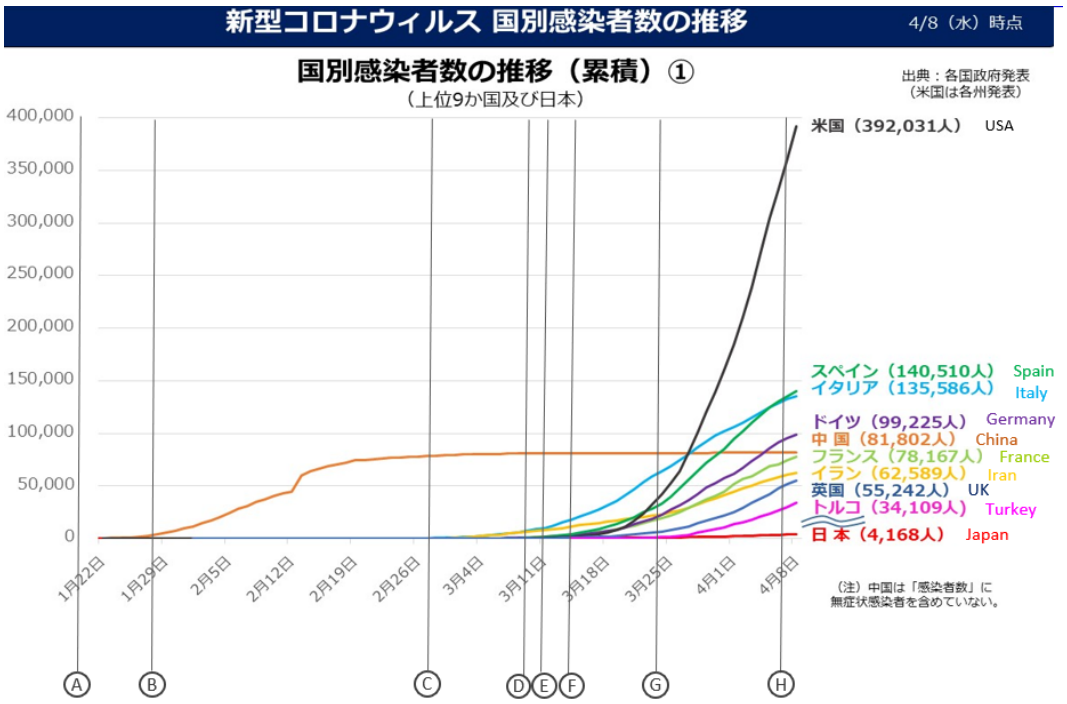
1. Labor Law (1)

COVID-19 in Japan - Overview

The novel corona virus disease, COVID-19 caused by the SARS-Cov-2 virus, first detected in Wuhan, the provincial capital of Hubei in Central China in December 2019, started to infect people in Japan on January 16, 2020. On March 13, 2020, two days after WHO declared that COVID-19 had reached the stage of a pandemic, the Special Measures Law Against Novel Influenza, et al. ("SMLANI"; Law No. 31 of 2012) was amended so that the COVID-19 is also covered by the SMLANI which enables the government to take certain emergency measures.

Japan was not or little affected by previous major respiratory diseases in the 21st century - SARS (outbreak in 2002) and MERS (outbreak in 2012). In 2009, the Influenza A virus subtype H1N1 spread in Japan, but – as compared with normal flu – it ended without causing a disaster (203 deaths as of January 3, 2010). SMLANI was enacted based on, among others, this experience. COVID-19, however, is the first and the biggest epidemic Japan has experienced after the World War II. Although for now the situation in Japan is less serious than in other countries such as the US and in Europe, it is already causing significant impact on human lives and economic activities in Japan.

COVID-19 is causing many legal issues in workplaces, and for transactions such as application of force majeure, etc. We will update on the legal implications of COVID-19 in Japan from time to time. In this first article, we will summarize the labor law aspects. On April 7, 2020, Prime Minister Abe declared state of emergency based on SMLANI for seven prefectures, but the below summary on the legal framework of HR aspects remains unchanged at this moment.



A) First diagnosis in Japan (1/16)
B) COVID-19 was designated as an "infectious disease" under the Infectious Diseases Control Law (1/28)
C) Government requested to close all elementary, junior high, and high schools in Japan until early April (2/27)
D) Amendment of Enforcement Order to the Act on Emergency Measures for Stabilizing Living Conditions of the Public (3/10)
E) WHO declared that the spread of COVID-19 has reached the stage of pandemic (3/11)
F) Amendment to the Special Measures Law Against Novel Influenza, et al. so that it also covers COVID-19 (3/13)
G) Postponement of the Tokyo Olympic / Paralympic has been announced (3/24)
H) Declaration of a State of Emergency (4/7)

Number of persons diagnosed to be infected by SARS-Cov-2 - Source of the line graph in Japanese: Ministry of Foreign Affairs of Japan (as of April 8, 2020)
https://www.anzen.mofa.go.jp/covid19/pdf/graph_suii1.JPG

Employer's Obligation - Duty of Care

Article 68 of the Industrial Safety and Health Act provides that the employer must prohibit the employees from working in case of certain diseases such as tuberculosis. This provision, however, does not apply to COVID-19, because COVID-19 was declared on February 1, 2020 as one of the "infectious diseases" under the Infectious Diseases Act. If this law is applied, according to the administrative interpretation, Article 68 of the Industrial Safety and Health Act is no longer applicable but instead, the rules of the Infectious Diseases Act shall apply. Under the Infectious Diseases Act, the governor of a prefecture has the power to

notify the ill (or possibly ill) employee or his/her guardian not to work for a certain period. However, such a letter is rarely issued by a governor.

However, this does not mean that the prohibition of work is impossible. The employer is obliged to ensure that the safety of the employee at work is guaranteed (duty of care / *anzen hairyo gimu* 安全配慮義務, § 5 Labor Contract Act). If serious infectious diseases are rampant, the employer shall take preventive measures to protect the safety of the employees as a legal obligation, and – moreover - so as to not be sued by the employee later on. If COVID-19 infection occurs among the employees, the employer not only *may* order by means of instructions that the employee in question stays at home, but also the employer *must* do so, because the duty of care also includes ensuring the safety of other employees in the workplace.

Employee's Claim on Wages

From Japanese labor law viewpoint, if the employee cannot work due to COVID-19, for the relevant employee this shall be treated as a normal illness. In Japan, there is no mandatory rule under which the employer must pay certain percentage of the wages to the employee during his/her sick leave. The employee may receive payments from social insurance (*shobyo teate kin* 傷病手当金), if the conditions of the insurance are met.

In Case of *Possible* COVID-19 Infection

What will happen if an employee catches a cold and starts coughing?

For the employer –
If there is only a suspicion of COVID-19 infection, depending on the likelihood of infection and the work environment of workplace, there may also be cases in which the employer must prohibit the relevant employee from coming to the workplace so as to fulfill the employer's duty of care.

For the employee –

(i) If the relevant employee takes voluntary leave, without being instructed by the employer to do so, to avoid the possible infection to his/her colleagues just in case it is really COVID-19, he/she will not be paid for such voluntary leave unless he/she takes a paid vacation.

(ii) If the employer instructs the employee to stay at home, the situation is different. Pursuant to Article 26 of the Labor Standards Act, the employer must, if such instruction is made for "reasons attributable to the employer", pay the relevant employee an allowance of 60% or more of the average salary during such period. The term "attributable" is broader than the "negligence" in the risk-taking rules and the term "reasons attributable to the employer" also includes commercial disruptions (recession, financial difficulties, material shortages, etc.) unless such commercial disruptions have been caused by *force majeure* such as natural disasters (earthquakes, tsunamis, etc.). This is a mandatory rule. Employment contracts or the Rules of Employment ("RoE") within the meaning of the Labor Standards Act (RoE is a unique system which characterizes Japanese labor law) that contradict this 60%-rule are not only invalid, but also failure to pay such allowance can be punishable.

The employer cannot force the relevant employee to take his/her paid vacation to avoid the payment of the (at least) 60%-wage. This is because the employee has a right to decide when to take the paid vacation. If certain conditions are met (such as the execution of the management-employee agreement and leaving at least five days of the paid vacation at the discretion of the employee), introduction of the planned paid vacation system is a worth considering as a solution.

Remote Working from Home

Most of the governmental countermeasures against COVID-19 are "requests" without legally binding effect. This also applies to the governmental requests to stay at home and work remotely to curb the spread of the virus. Does the employer have the power to order its employees to work from home remotely? If there is a provision on this possibility in the individual employment agreement or the RoE, it is possible. From labor law viewpoint, if neither the individual employment agreement nor the RoE allow this, it is difficult unless a special law is enacted in this respect, which does not exist as of the date hereof. Amending all individual employment agreements is in most cases too time-consuming. Amending the RoE to the disadvantage of the employees is normally difficult, but it is accepted if the amendment is quite rational. There is no straightforward court precedent so far regarding COVID-19 in this respect, but there is fairly a good chance to argue to insert a provision into the RoE to enable the employer to instruct the remote working in an emergency situation like the current one.

For German-speaking readers, please also refer to the article titled "Was Unternehmen zum Coronavirus wissen sollten – Arbeitsrecht, höhere Gewalt, Wuchergeschäfte" in the Spring 2020 issue of JAPANMARKT, published by the German Chamber of Commerce and Industry in Japan. This German article is based on the information as of February 14, 2020, but as long as the labor law-framework of this topic is concerned, it is still up-to-date.

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